North Dakota Attorney General's LAW REPORT

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JURY SELECTION - BATSON OBJECTION

In *Snyder v. Louisiana*, ____ U.S. ____ (2008), the court reversed a murder conviction on the ground that the trial court committed clear error in its ruling on a Batson objection to the exclusion of a juror by peremptory challenge.

Batson v. Kentucky, 476 U.S. 79 (1986), provided a three-step process for a trial court to use in adjudicating a claim that a peremptory challenge of a juror was based on race. First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race; second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question; and third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

In reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted.

After the prosecution made a peremptory challenge of one of the black jurors at Snyder's trial, an objection was made by defense counsel. The prosecution offered two race-neutral reasons for the strike explaining that the prospective juror looked very nervous throughout the questioning and, because he was a student teacher and might miss class, the prosecutor's concern was that the juror might come back with a guilty verdict of a lesser verdict to avoid a penalty phase to go home quickly. The trial court upheld the strike of the juror.

On appeal, the court rejected the basis for striking the juror. Nothing in the record showed that the trial judge actually made the determination concerning the potential juror's demeanor or his nervousness. The judge allowed the challenge without explanation.

The second reason provided for the strike of the potential juror, the student teaching obligation, did not support the peremptory strike. This juror was one of more than 50 members of the jury panel who expressed concern that jury service or sequestration would interfere with work, school, family, or other obligations. During jury selection, a law clerk, at the direction of the trial judge, called the juror's dean who stated that the dean did not have a problem with the juror completing his course requirements as long as it was just the week of trial. The potential juror then did not express any further concern about serving on the jury.

Looking at the circumstances of this case, it was apparent that serving on the jury would not have seriously interfered with the potential juror's ability to complete required student teaching. Jury selection occurred on August 27, the prosecution struck the juror the following day on August 28, the guilt phase of the trial ended on the 29th, and the penalty phase was completed by the end of the week, on August 30. The brevity of the trial was something that the prosecutor anticipated and the dean's promise to work with the juror to see that he was able to make up any teaching time rendered the prosecution's justification for striking the juror as suspicious.

The court then made comparisons between the struck juror and a white juror who also offered strong reasons why serving on a sequestered jury would cause him hardship. The prosecution did not express the same concern with this and other white jurors with similar concerns and did not exercise peremptory strikes on those jurors.

The prosecution failed to provide a substantial basis to justify the striking of the black juror or overcome an adverse inference that the juror strike was based on purposeful discrimination.

VIENNA CONVENTION -- APPLICATION TO STATE COURT PROCEEDINGS

In *Medelln v. Texas*, ____ U.S. ____ (2008), the court held that article 36(1)(b) of the Vienna Convention on Consular Relations is not a directive to domestic or state courts and that it, and other international agreements, do not provide for implementation of international court of justice judgments in domestic courts.

Medelln, a Mexican national, was convicted of capital murder and sentenced to death in Texas for the gang rape and brutal murder of two young girls. After his convictions, he, and 50 other Mexican nationals, obtained an order claimed from the International Court of Justice, established through the United Nations, concluding that the United States had violated the Vienna Convention by failing to inform Medelln and the other Mexican nationals of their Vienna Convention rights and that the United States was obligated to reconsider their convictions and sentences.

The Vienna Convention established the procedures for notification of the consulate of foreign nationals upon arrest to permit the foreign national to obtain the assistance of that consulate.

Medelln claimed that the International Court of Justice's judgment constituted a binding obligation on state and federal courts in the United States. However, not all international law obligations automatically constitute binding federal law enforceable in United States courts. The court concluded that the treaties under which the International Court's decision was made was not a directive to domestic courts, did not contemplate automatic enforceability of ICJ decisions in domestic courts, and did not automatically constitute federal law judicially enforceable in United States courts. The international agreements themselves do not provide for implementation of ICJ judgments through direct enforcement in domestic courts and, where a treaty does not provide a particular remedy, either expressly or implicitly, it is not for the federal courts to impose one on the states through lawmaking of their own.

DUI - PENALTY ENHANCEMENT - SENTENCE

In *State v. Emery*, 2008 ND 3, 743 N.W.2d 815, the court ordered a DUI sentence to be corrected.

The defendant was found guilty of DUI. During sentencing, the State asserted that the defendant had a prior DUI within the past five years. Reference was made to the defendant's driving abstract, but it was not offered into evidence. The judge asked the defendant if he had been convicted of a DUI within the past five years, and the defendant nodded his head.

The defendant was sentenced as a second DUI offender and ordered to surrender his license plates. The defendant filed a motion to correct the sentence claiming that his sentence was illegally enhanced by his prior DUI without proper evidence to support enhancement.

Although the defendant's sentence of 30 days in jail, with 25 days suspended, and with a $1,000 fine with $500 suspended, was within the class B misdemeanor sentencing range, the district court's order listed the DUI as the defendant's second offense within five years and ordered that the defendant surrender his license plates. Because of this confusion, the court concluded that the defendant's sentence was enhanced to reflect a second DUI offense within five years because there was no authority for a judge to require a surrender of license plates for a first offense DUI.

A DUI conviction cannot be used to enhance the penalty of a subsequent DUI conviction when there is no proof that the defendant waived his right to counsel before pleading guilty to the earlier DUI charge. A prior uncounseled conviction without waiver of counsel is an impermissible factor which may not be substantially relied on by a trial judge in sentencing a defendant. A trial court commits error in presuming a defendant validly waived the right to counsel when the record does not affirmatively indicate such a waiver. Once the reliability of a prior conviction is established by showing the defendant had counsel, the burden shifts to the defendant to affirmatively show the convictions were deficient under N.D.R. Crim. P. 11.

The record before the court did not contain evidence of a prior counseled conviction within five years nor of a waiver of counsel by the defendant in the prior DUI proceeding. The sentence cannot be enhanced to a second DUI offense within five years.

The defendant requested on appeal that the court direct the trial court to enter a sentence without

regard to the prior DUI conviction and that he be sentenced as other first offenders to impose supervised probation and not jail time.

Rejecting this request, the court noted that a sentencing judge has discretion in sentencing when acting within the limits prescribed by law. The court will not require a judge to impose any specific sentence.

HEARSAY - PRIOR CONSISTENT STATEMENT

In *State v. Wegley*, 2008 ND 4, 744 N.W.2d 284, the court affirmed the defendant's conviction of gross sexual imposition.

Prior to trial, the State made a pre-trial motion under N.D.R. Evid. 803(24) to admit out-of-court statements made by the child victim to her mother at the time of the alleged act and to a social worker during a forensic interview that was videotaped. The trial court did not rule on the motion immediately.

After jury selection, the victim was called as the first witness and was subject to cross-examination. After the child testified, the district court adjourned for the day and, on the morning of the second day of trial, the court analyzed the State's offer of proof about the child's out-of-court statement to the mother and granted the State's pre-trial motion to admit the mother's testimony about the child's out-of-court statement. The motion regarding the social worker's testimony was withdrawn. The trial court, nevertheless, ruled the statement was admissible after analyzing the State's offer of proof about the child's out-of-court statement but did not view the videotape.

The social worker testified, without contemporaneous objection by the defendant, that during the forensic interview of the child, the child said something happened with her grandfather, and when the child was asked what part of her body her grandfather had touched, the child pointed to a vagina on an anatomical drawing which she labeled as her "pee pee." The child did not verbalize anything more and did not want to talk about what happened. The child's mother also testified, without contemporaneous objection by the defendant, that she observed the defendant and the child in the mother's bedroom and described that she saw the defendant rubbing her daughter after a blanket was removed.

The defendant claimed on appeal that the district court committed error in admitting testimony regarding the child's out-of-court statements to her mother and to the social worker.

The court explained the purpose of N.D.R. Evid. 803(24) and its application. When the mother and the social worker testified at trial about the child's nod and gesture, the defendant did not make a contemporaneous objection. If a defendant objects to hearsay testimony in a pre-trial hearing on a motion under Rule 803(24), the defendant's failure to object at trial limits the appellate court's inquiry to determine whether the admission of that testimony into evidence constituted obvious error affecting substantial rights under N.D.R. Crim. P. 52 (b).

The court noted that there was no hearing or finding on the State's pre-trial motion in advance of the trial of the sexual abuse issue as contemplated by Rule 803(24)(a). Rather, the hearing and decision on the pre-trial motion occurred during the trial and the court did not condone that delay in resolution of the issue.

The defendant claimed that it was error to permit the mother's testimony about the child's out-of-court nod in response to the mother's statement, "He was touching private, has he did that before?"

Under the hearsay evidence rule, a "statement" is "nonverbal conduct of a person, if it is intended by the person as an assertion." In this case, the child's nonverbal conduct, a nod, in response to the mother's statement was intended as an assertion and is a statement under N.D.R. Evid. 801(a). Although the child's nod is a statement, a statement is not hearsay under the Rules of Evidence if the declarant testifies at trial and is subject to cross-examination concerning the statement, the statement is consistent with the declarant's testimony, and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.

Three requirements are necessary for non-hearsay under N.D.R. Evid. 801(d)(1)(ii). First, the declarant must have testified and been subject to cross-examination about the statement; second, the statement must be offered to rebut a charge of recent fabrication or improper influence or motive; and, finally, the statement must be a

prior consistent statement made before the charge of recent fabrication or improper influence or motive arose.

During the defendant's opening statement to the jury, his counsel stated that they were contesting sexual contact with the child. The mother's testimony was consistent with the child's prior testimony that the defendant had touched her in her private parts and that she had told her mother that the defendant had touched her. This testimony rebutted a charge of recent fabrication or improper influence or motive and was not hearsay.

The defendant also claimed that the social worker's testimony regarding a gesture the child made to an anatomical drawing was also rejected. The court concluded that the child's gesture was intended as an assertion, and the social worker's testimony about the child's prior out-of-court statement was admissible as a prior consistent statement. As with the mother's testimony, the social worker's testimony rebutted a charge of recent fabrication or improper influence or motive.

SEARCH AND SEIZURE - INVESTIGATORY STOP

In *City of Grand Forks v. Mitchell*, 2008 ND 5, 743 N.W.2d 800, the court affirmed the defendant's convictions resulting from a traffic stop.

An officer observed the defendant operating a vehicle with no license plates but with an 8½ x 11-inch Montana temporary registration certificate printed on a white sheet of paper with an expiration date written in black marker posted in the vehicle's rear window. After the stop, the defendant was observed with signs of alcohol consumption and was subsequently arrested.

The defendant first claimed that the stop of his vehicle was not supported by reasonable and articulable suspicion because he had a lawful registration certificate issued by the state of Montana.

Police officers may stop individuals for investigative purposes if a reasonable and articulable suspicion exists that criminal activity is afoot. This standard is objective and based on the totality of the circumstances. This standard did not take into account a police officer's subjective intentions in making a stop.

The court held that the 8½ x 11 sheet of paper in the rear window of the defendant's vehicle, which was without license plates, provided reasonable and articulable suspicion that the defendant was not complying with motor vehicle registration laws, justifying the stop. The Montana-issued permit was unusual because it was an 8½ x 11 plain sheet of paper, while North Dakota permits are smaller, pre-printed forms. The officer's suspicion did not arise just because the defendant's registration was from another state, but because a reasonable officer who sees a vehicle without license plates and with an 8½ x 11 white sheet of paper in the rear window that the officer does not recognize as an authentic temporary registration certificate would have reasonable grounds to stop the driver and check if the driver has a valid temporary registration certificate in his possession in accordance with state law. The form did not resemble any type of temporary registration with which the officer was familiar. The officer had reasonable grounds to further investigate whether the paper was a valid or a fictitious registration certificate.

SEARCH AND SEIZURE - PROBABLE CAUSE - GARBAGE SEARCH

In *State v. Schmalz*, 2008 ND 27, 744 N.W.2d 734, the court affirmed the defendant's possession of marijuana convictions.

Officers received information that the defendant had involvement with narcotics. An investigation began and a garbage search was conducted of trash placed on the sidewalk in front of the defendant's home. During the search of the trash, the officers found a paper towel with a dark substance which the officer believed to be burnt marijuana residue, as well as packaging tape and cellophane packaging that smelled of marijuana. The trash also contained mail addressed to the defendant.

A search warrant was issued based upon the testimony of the officer regarding the garbage search. The testimony did not, however, address how many trash cans were placed on the sidewalk for disposal or whether the trash disposal drop-off point was typically used as the disposal point for

the entire mobile home park where the defendant resided. The testimony also did not explicitly state that the mail addressed to the defendant was found in the same trash container as the material containing marijuana or smelling of marijuana.

The search warrant was executed and drugs were found in the defendant's home. After a request for consent, the defendant permitted a search of his vehicle where marijuana was also found.

In upholding the search of the trash, the court recognized that, under the current rule in North Dakota and federal courts, the defendant lost his expectation of privacy when he placed the trash for collection. The garbage search fell outside the protections of the state and federal constitutions. In evaluating the constitutionality of a search and seizure under the constitution of North Dakota, the court will employ the same test used by the United States Supreme Court. The defendant did not have a reasonable expectation of privacy in his trash once it is placed out in public for disposal. The evidence gathered in the trash was admissible for the purposes of the warrant application.

The court expressed some concern regarding the facts surrounding the trash can search. A question arose regarding the nexus between the drug evidence and mail tying that evidence to the defendant's residence. However, it could be inferred that the judge understood the testimony to mean the items were all in the same can or bag where the drug evidence was found. Noting that the case presented a questionable nexus tying the defendant to a substance the officers believed to be marijuana based upon their experience and training, but without confirmation from a lab or field test, the warrant hearing provided a marginal or doubtful case supporting the validity of the warrant. However, doubtful or marginal cases require the court to affirm the magistrate's determination that probable cause existed so long as there is a substantial basis for the conclusion.

The dark-colored residue the officers believed to be burnt marijuana was never tested to confirm it was marijuana. The question arose whether the determination by trained and experienced narcotics officers that residue and other objects that smell like marijuana constituted a factual basis upon which probable cause establishes the defendant's garbage contained marijuana and that the defendant had been committing, or was committing, a crime. The mere smell of marijuana as detected by a trained and experienced officer has been held by the court to create a sufficient factual basis upon which to establish probable cause. Based upon the officer's testimony regarding his training and experience as a police officer, the smell of marijuana on all three pieces of evidence and the existence of residue that looked like burnt marijuana were sufficient factual bases to issue a warrant.

SEARCH AND SEIZURE - REASONABLE EXPECTATION OF PRIVACY

In *State v. Kochel*, 2008 ND 28, 744 N.W.2d 771, the court reversed the defendant's conviction of drug offenses concluding that law enforcement officers conducted an unreasonable search and seizure when searching an addition to the defendant's home without a warrant.

The defendant lived in a mobile home located in rural Adams County. The home had a fully enclosed addition with its own storm door. The addition had deck-like steps leading to an entry door and a "no hunting or trespassing" sign was mounted on the handrail next to the steps. There were several other "no trespassing" signs on the property, including one at the driveway turnoff, one on an outbuilding, and one on each end of the property bordering the road. The addition was carpeted and contained a stocked freezer, clothes, tools, and other personal items. The home had two other entrances.

Law enforcement officers went to the defendant's residence performing a welfare check on another individual who was alleged to frequent the residence. They observed an individual walking near the residence, but lost sight of that person upon arrival. The officers approached the entry door which was open halfway. One officer knocked on the doorframe and inquired as to whether anyone was home. After receiving no response, the officer went through the doorway and knocked on another interior door that was open, receiving no response. From his position in the open inner doorway, the officer was able to see a light bulb with its base removed containing dark residue on the table just beyond the doorway. Matches were seen on the table, and the officer believed that the light bulb constituted drug paraphernalia.

A search warrant was obtained based on these observations. A search warrant was executed and drugs were found in the home.

Whether an individual has a reasonable expectation of privacy is reviewed de novo. Warrantless searches and seizures inside a home are presumptively unreasonable. When a house has an enclosed porch, vestibule, or entryway attached to the home, the reasonableness of each situation must be given due consideration to the particular characteristics of the home in question.

Although the United States Supreme Court has determined that "no trespassing" signs in open fields cannot effectuate an increased expectation of privacy, a "no trespassing" sign on a structure, particularly a residence, indicates a reasonable expectation of privacy.

When calling on an individual at a residence, law enforcement officers engaged in legitimate business have no less right to be there than any member of the public calling at that home. A "no trespassing" sign posted on a residence indicates uninvited guests, including law enforcement officers lacking a warrant, are unwelcome. The defendant testified the reason for posting the sign was to keep people out of his home. The "no hunting or trespassing" sign alerted members of the public that the defendant's addition was a private area not accessible without the resident's permission. Any uncertainty that the addition was an integral part of the home where privacy is reasonably expected is removed by the presence of the sign. In addition, viewing the exterior of the addition, the structure was fully enclosed by wooden walls complete with a door and a window. The defendant's home had two other entrances where officers could have knocked, including one on the same side of the house as the addition. The officers did not attempt to knock at either of the alternative doors before entering the addition. The defendant stored many personal items in the addition that would have been visible to someone at the threshold of a half open door. This suggested the addition was being used as a room rather than as a vestibule or entryway. Presence of personal property such as clothing indicates that an area is private. These visual indicators suggested a reasonable expectation of privacy that the officers should have acknowledged.

The fact that the door was partially open does not alone justify an officer's entry into the home. Considering the "no hunting or trespassing" sign, the size of the room, presence of a window and carpeting, and presence of personal property, the defendant's addition was an integral part of his home to which an objective expectation of privacy should extend. Law enforcement's warrantless entry into this addition was unreasonable, and the trial court should have excluded all evidence obtained from the search.

GUILTY PLEA - WAIVER OF DEFENSE

In *Patten v. State*, 2008 ND 29, 745 N.W.2d 626, the court affirmed the trial court's order finding that Patten's trial counsel did not provide ineffective assistance of counsel and refusing to permit Patten to withdraw his guilty plea.

Patten entered a plea of guilty in February of 2002 to numerous offenses while represented by counsel. After receiving a factual basis for the plea from Patten and the prosecutor, and after advising Patten of his N.D.R. Crim. P. 11 rights, the plea was accepted and Patten was later sentenced.

In August of 2006, Patten filed a motion for a psychiatric evaluation which was granted. The clinical psychologist who performed the evaluation concluded that Patten was not criminally responsible for his prior criminal offenses due to his mental condition, but that he was likely competent at the time he pled guilty to the charges.

Patten moved for post-conviction relief claiming he did not receive effective assistance of counsel because his attorney did not request a psychiatric evaluation to determine his condition before allowing him to plead guilty to the criminal charges. He also claimed that he should be allowed to withdraw his guilty plea because his 2006 psychiatric evaluation showed he was not criminally responsible when he committed the earlier offenses. His application for post-conviction relief was denied.

At the post-conviction hearing, Patten's trial counsel stated that they did discuss the psychiatric evaluation, Patten did not want a psychological evaluation, and Patten wanted to plead guilty. The district court determined that the attorney's version of the events was more credible than Patten's version. His attorney believed there was no need to force him to have an evaluation if he did not want one and wanted to plead guilty.

Patten failed to establish his attorney's performance was deficient.

The court also rejected Patten's claim that his guilty pleas should be withdrawn. He voluntarily entered a plea of guilty as a waiver of all non-jurisdictional defects. If a defendant is competent and voluntarily pleads guilty, the defendant waives the right to raise the defense of lack of criminal responsibility when the acts occurred. The court will not second-guess matters of trial strategy.

PRE-TRIAL MOTION - WAIVER OF DEFENSE

In *State v. Skarsgard*, 2008 ND 31, 745 N.W.2d 358, the court affirmed the defendant's convictions of actual physical control and resisting arrest.

Although the defendant filed motions in limine regarding prior driving offenses, no other motions were filed, nor did the defendant attempt to raise the issue of lack of Miranda warnings at the time of arrest at any time before trial. When the Miranda issue was raised at trial, it was not raised as a basis for requesting that evidence be suppressed.

On appeal, the defendant claims that the district court committed error in failing to suppress all evidence seized when the defendant was arrested because the arresting officer failed to provide the defendant with a Miranda warning prior to, or upon, arrest. The failure to give a Miranda warning was not raised until trial was underway. In addition, no motion was made to suppress any evidence acquired after a Miranda warning should have been given. The issue of whether the alleged Miranda violation would support suppression was raised for the first time on appeal.

Because the defendant did not provide the district court with a pre-trial motion under N.D.R. Crim. P. 12(b)(3)(C), a motion to suppress evidence, he waived his suppression argument and thus did not properly preserve the issue for appeal. Motions must be made before trial or they are waived.

The court may grant relief from the waiver if the defendant establishes "just cause." The defendant did not allege or provide just cause for his failure to raise the issue pre-trial at the district court level. He merely asserted that the district court should have reversed all convictions because the evidence gathered during the stop was constitutionally suspect. The issue was not properly preserved on appeal and would not be considered by the court.

SEARCH AND SEIZURE - CONSENT - APPARENT AUTHORITY - PRO SE REPRESENTATION - BAIL - JURY SELECTION - SPEEDY TRIAL

In *State v. Fischer*, 2008 ND 32, 744 N.W.2d 760, the court affirmed the defendant's drug convictions.

The defendant was arrested after law enforcement officers discovered him manufacturing methamphetamine in a pole barn in rural Morton County. The defendant and his wife had been renting a home on the farmstead owned by the estate of Mabel Nelson. Randy Nelson served as "acting landlord" of the premises. The defendant and his wife had been evicted from the property and were to have their belongings off the premises by November 15, 2004. On November 30, 2004, Ricky Nelson, an heir of the estate, contacted law enforcement and requested that the officer go to the farmstead and inspect a bucket he had found in the pole barn. He had tools in the barn and he and his family were allowed access to the building. When law enforcement officers went to the farmstead and went into the pole barn, they discovered the defendant in the process of manufacturing methamphetamine.

The defendant claimed that the officers' entry was not permitted because they did not have a search warrant and Ricky Nelson was not an actual owner of the property authorized to consent to the search. In rejecting this claim, the court noted that even if the defendant had a reasonable expectation of privacy in property from which he had been evicted, consent is a clearly delineated exception to the warrant requirement. Law enforcement officers do not have to obtain consent from the owner of the property, but valid consent to search may be given by parties with actual or apparent common authority when viewed from the officer's perspective. Upon the facts of the case, the court concluded that the officers could reasonably conclude that Ricky Nelson had apparent authority to consent to the search, and the warrantless entry into the pole

barn did not violate the defendant's Fourth Amendment rights.

Prior to trial, the defendant requested that he represent himself in the proceedings. The defendant requested that his three court-appointed attorneys be discharged. The district court denied the motion as to the third attorney, but did allow the defendant to represent himself, requiring the third court-appointed attorney to provide assistance as standby counsel. This attorney assisted the defendant during a suppression hearing, as well as during a two-day jury trial.

On appeal, the defendant claimed that his third attorney did not do enough to help him. The court noted that this assumes an ineffective assistance of counsel claim can be asserted against standby counsel. In addition, the defendant made other claims of ineffective assistance against his prior court-appointed attorneys. The court rejected each assertion since the defendant failed to establish that his attorneys' assistance was plainly defective or that he was prejudiced by their performance.

The defendant claimed that he was forced to choose between self-representation and "poor counsel" and, consequently, his choice to act as his own attorney was involuntary. In rejecting this claim, the court noted that the record clearly demonstrated the defendant's intention to represent himself from the outset of the proceedings. He filed numerous written motions and other court filings, secured an acquittal on one of the charges, and effectively cross-examined witnesses. His behavior indicated the use of pre-trial motion practice in requesting different lawyers to obstruct the legal process. The defendant's waiver of the right to counsel was voluntary and was made knowingly and intelligently.

The defendant also claimed that his due process rights were violated by his inability to access legal materials while being held at a Morton County correctional center pending trial. Courts have held that a criminal defendant who knowingly and intelligently waives the right of counsel and elects self-representation and who has been appointed standby counsel is not constitutionally entitled to access to a law library. The district court's appointment of standby counsel for the defendant satisfied the state's obligation to provide him with access to the courts. He acknowledged the attorney dropped off some legal materials at the jail prior to the suppression hearing. The defendant was not denied access to the courts during his pre-trial detention.

The defendant also raised his inability to post bail prior to trial. Pre-trail bail issues are moot after conviction unless the amount prejudiced the defendant in the preparation of his defense. Although the defendant contended his inability to post bail caused the loss of his painting and drywall business, he did not claim it prejudiced him in the preparation of his defense. The issue was moot.

The court also rejected the defendant's argument that he was not tried by an impartial jury representing a fair cross-section of the community. He claimed the jury was not impartial because the jury questionnaires revealed that one-third of the persons in the jury pool or their spouses were employed by state or county governments.

Persons accused of crimes have a federal and state constitutional right to be tried by an impartial jury. Government employment does not constitute an implied bias under N.D.C.C. § 29-17-36, but a government employee, like others, may be challenged for actual bias. When given the opportunity by the district court to challenge any of the jurors for cause, the defendant declined.

Finally, the court concluded that the defendant was not deprived of a right to speedy trial. A delay of one year or more between an arrest and trial may violate the right to a speedy trial and is presumptively prejudicial, but a presumptively prejudicial delay does not alone create a speedy trial violation. Fifteen months elapsed between the arrest and the trial. The reason for the delay did not weigh in the defendant's favor. The primary reason for the delay in this case was the defendant's dissatisfaction with his attorneys, which resulted in multiple changes of court-appointed counsel. The defendant's actions caused most of the delay, and there was no evidence that the State purposely delayed the trial. The defendant did not assert his speedy trial rights until almost one year after his arrest and three months before trial. A failure to timely assert the right to a speedy trial weighs against establishing a speedy trial violation has occurred. In addition, he failed to establish that he suffered actual prejudice as a result of the delay.

WITHDRAWAL OF GUILTY PLEA BEFORE SENTENCING

In *State v. Lium*, 2008 ND 33, 744 N.W.2d 775, the court reversed the trial court's order denying the defendant's motion to withdraw his guilty pleas.

The defendant was charged with attempted murder. In a written plea agreement, the defendant, with counsel, agreed to enter a plea of guilty to two class C felonies. The written plea agreement said the prosecution would seek to have the sentence for both charges imposed consecutively at the maximum term of incarceration for a total of 10 years, but the defendant was free to argue for a lesser sentence for no less than 7½ years in custody.

At a change of plea hearing, the district court accepted the defendant's guilty pleas after determining that he understood the plea agreement and his rights. The State provided the court with a factual basis for the charges, and the court accepted the defendant's pleas and ordered a pre-sentence investigation. The court also informed the defendant that the pre-sentence investigation would be part of the basis for the court's sentence and if the court felt that the range that the parties had agreed to for sentencing was too light or too harsh, the court could reject the agreement and give him the opportunity to withdraw his pleas.

After acceptance of the plea of guilty but before sentencing, the defendant stated that he wanted to rescind his pleas if the court felt obligated to impose the sentences outlined in the plea agreement and expressed his unhappiness with the representation he received.

Before sentencing, the defendant retained a new attorney and moved to withdraw his guilty pleas, submitting an affidavit to the court stating the grounds for that request. The district court denied the motion, ruling withdrawal of the guilty pleas was not necessary to correct a manifest injustice and the pleas were voluntarily and intelligently given.

Under N.D.R. Crim. P. 32(d), the standard for a district court's consideration of a defendant's request to withdraw a guilty plea differs depending on when the motion to withdraw is made. A defendant has a right to withdraw a guilty plea before it is accepted by the court. After a guilty plea is accepted, but before sentencing, the defendant may withdraw a guilty plea if necessary to correct a manifest injustice or, if allowed in the court's discretion, for any fair and just reason unless the prosecution has been prejudiced by reliance on the plea. After a court has accepted a plea and imposed a sentence, a defendant cannot withdraw a plea unless the motion is timely and withdrawal is necessary to correct a manifest injustice.

Although the court has recognized a preference to liberally allow withdrawal of a guilty plea when the motion to withdraw is before sentencing, Rule 32(d) is not standardless and does not allow withdrawal as a matter of right after a plea has been accepted. A defendant has the burden of proving that a fair and just reason supports withdrawal of a plea, or that withdrawal is necessary to correct a manifest injustice.

A trial court's determination of a manifest injustice or the occurrence of a fair and just reason is within the court's discretion and will not be reversed on appeal absent an abuse of discretion. In this case, the district court denied the withdrawal motion, stating that withdrawal of the guilty plea was not necessary to correct a manifest injustice and that the defendant's pleas were voluntary and intelligent. This was not an abuse of discretion. However, the district court did not decide whether there was a fair and just reason for withdrawal of the defendant's pleas and, if so, whether the State was prejudiced. The district court abuses its discretion when it misapplies the law. The fair and just reason for withdrawal of a guilty plea involves a lesser showing than is required to establish manifest injustice. Arguments raised by the defendant about the assertion of innocence or a possible defense, although not sufficient to warrant a conclusion that the district court abused its discretion in deciding withdrawal was not necessary to correct a manifest injustice, may support a fair and just reason for withdrawal. The district court misapplied the law in failing to decide whether there was any fair and just reason to allow the defendant to withdraw his pleas, and the matter was remanded to the district court to make that determination.

SEARCH AND SEIZURE - INVESTIGATORY STOP - INFORMATION FROM OTHER LAW ENFORCEMENT OFFICERS

In *City of Minot v. Keller*, 2008 ND 38, 745 N.W.2d 638, the court reversed the trial court's order suppressing evidence, concluding that the law enforcement officer had reasonable and articulable suspicion to stop the defendant's vehicle.

The manager of a Wendy's restaurant reported to the Minot Police Department that an individual in a blue GMC pick-up with a specific license number was bothering an employee. Several restaurant employees claimed the individual smelled of alcohol and believed he was intoxicated.

An officer located the pick-up truck parked by another store and talked to the defendant. The officer concluded that the defendant was intoxicated based on his observations, but he did not perform any field sobriety tests or preliminary breath tests. The officer told the defendant not to drive in his condition and waited outside the store for approximately one hour but did not observe the defendant return to his truck.

The officer told another officer that the defendant was intoxicated. The second officer did not observe the defendant return to his vehicle, but he later saw the vehicle being driven by a male matching the defendant's description. Although the second officer could not positively identify the defendant as the driver of the vehicle, he turned on his lights and initiated a traffic stop. The defendant was later arrested by the second officer.

The trial court suppressed all evidence obtained after the traffic stop, concluding that the second officer did not have a reasonable and articulable suspicion necessary to make the traffic stop.

A law enforcement officer must have a reasonable and articulable suspicion that a driver has violated, or is violating, the law before making an investigative stop. Mere curiosity, suspicion, vague hunches, or other non-objective facts will not be sufficient.

In this case, each of the two officers observed information sufficient to satisfy one of the two elements of the crime of DUI. The first officer observed the defendant in an intoxicated state, and the second officer observed the defendant driving. The "collective knowledge doctrine" allows law enforcement officers to rely on information from other officers to establish probable cause. This principle has also been applied to establish reasonable and articulable suspicion.

The issue in this case was whether the facts from one officer or agency may be combined with the facts from the second officer or agency to establish reasonable and articulable suspicion if the facts, uncombined, fall short of this legal standard.

The second officer needed to have only reasonable and articulable suspicion to stop the defendant. Reasonable and articulable suspicion is a lesser standard than probable cause, requiring only an objective manifestation that an individual has engaged in unlawful activity. Tips from known informants who are not otherwise affiliated with law enforcement have been used to justify investigatory traffic stops provided the tips are otherwise reliable. It would be illogical for the court to require independent corroboration of information from police officers, who are presumptively reliable, when not also requiring corroboration of information from non-police informants.

However, for knowledge to be imputed from one officer to another, the information must actually be communicated to the acting officer in advance of the police action. The communication requirement prevents unjustified police action from being taken in the hope it is later validated by tallying the knowledge of every officer and agency involved in the case.

The district court suppressed the evidence against the defendant after determining the information communicated by the first officer to the second stopping officer was not sufficient to establish a reasonable and articulable suspicion because the second officer did not independently corroborate the information. Prior North Dakota case law did not require that one officer verify another officer's communication of suspected illegal activity. Rather, officer-to-officer communications are presumptively reliable. Observations made by one officer may be communicated to a second officer who, after observing additional conduct, can combine the communicated observations with his own to thereafter have reasonable and articulable suspicion to stop. The observations made by the law enforcement officers provided reasonable and articulable suspicion to stop the defendant's vehicle, and the suppression order was reversed.

SEARCH AND SEIZURE - TERRY FRISK

In *State v. Brockel*, 2008 ND 50, ____ N.W.2d ____, the court reversed the defendant's conviction of possession of drug paraphernalia concluding that it was permissible for an officer to conduct a pat-down search of the defendant before he was placed in a Highway Patrol vehicle. The trooper testified that the defendant's actions showed a high level of nervousness for a routine traffic stop. The trooper asked the defendant to come back to his patrol car for completion of the citation and asked if he could pat the defendant down for weapons before entering the car. Upon patting him down, the trooper felt an object in the defendant's pants pocket, asked the defendant to remove the object, and it was found to be a "dugout" used for smoking marijuana.

The defendant claimed that the seized evidence should have been suppressed because the trooper did not have a reasonable suspicion to search him. In agreeing with the defendant, the court noted that a law enforcement officer may order a person out of a vehicle when the person has been lawfully detained. The mere inconvenience of getting out of one's vehicle cannot prevail when balanced against legitimate concerns for the officer's safety.

An officer can also order the driver to sit in a patrol car while the officer issues a citation. There may be an additional increment of intrusion into a driver's personal liberty when he is ordered into a patrol car, but this increased intrusion does not outweigh public policy concerns for the safety of police officers.

The defendant did not argue that the stop of his vehicle was improper. The speeding violation was a sufficient reason for the trooper to stop the vehicle, order the defendant out of his vehicle, and have him sit in the patrol vehicle.

A law enforcement officer may conduct a frisk or a pat-down search of a person only when the officer possesses a reasonable and articulable suspicion the individual is armed and dangerous. The sole justification of a pat-down search is the protection of the officer and others nearby.

The fact-finder must use an objective standard to determine whether or not a reasonable person in the officer's position would be justified by some objective manifestation to suspect the defendant was, or was about to be, engaged in criminal activity. The validity of a protective search does not depend upon the searching officer actually fearing the suspect is dangerous, but such a search is valid if a hypothetical officer in the same circumstances could reasonably believe the suspect is dangerous. To comply with the Fourth Amendment, a pat-down search must consist of a limited patting of the outer clothing of a suspect for concealed objects that might be used as weapons.

Based upon the record, it appeared that the trial court concluded, as a matter of law, that an officer can conduct a pat-down search before placing a person in a patrol car. However, the court did not make a finding whether there was a reasonable suspicion justifying a pat-down search on this defendant. There was testimony that the defendant seemed very nervous and fidgety and avoided eye contact while in his car, but the court made no findings as to these facts and reached no conclusion as to whether the facts gave rise to a reasonable suspicion. A pat-down may be conducted only if there is a reasonable suspicion that the individual is armed and dangerous.

The district court committed error when it concluded as a matter of law that the trooper could search the defendant before placing him in his patrol car. Either reasonable suspicion or voluntary consent needs to be present to justify a pat-down search. However, the court made no findings whether either was present in this case. On remand, the court must make findings as to whether there was reasonable suspicion or consent for the search to be justified in this case.

REVOCATION OF PROBATION - RESTITUTION

In *State v. Jacobsen*, 2008 ND 52, ____ N.W.2d ____, the court upheld the defendant's revocation of his probation for willfully failing to pay restitution as ordered by the court.

The defendant issued a check for $37,000 to a public school without sufficient funds. Under a plea agreement, the defendant agreed to plead guilty and to pay full restitution of the $37,000 and be subject to a one-year deferred imposition of

sentence during which time the defendant would be on supervised probation.

After assurances from the defendant that he would pay restitution upon the sale of a house, the court required the defendant to maintain suitable employment and pay restitution of $37,000 with required monthly payments of at least $3,000. After acceptance of the guilty plea and order deferring imposition of sentence for one year, the defendant was allowed to move to Florida where he was supervised by Florida Department of Corrections officials. The defendant made two $3,000 monthly restitution payments, but failed to make any payment thereafter. It was later learned that the defendant had been unemployed for over two months, that his wife and children had moved to Indiana to live with her family, and the defendant was homeless and living with his brother in Florida. After filing a petition for revocation of his probation, the defendant subsequently made a $12,000 restitution payment in December of 2006 and paid off the $19,000 balance in January of 2007.

At the probation revocation hearing, the State presented evidence that the defendant and his wife had sold their house in July of 2006 and received a check for over $55,000 upon closing. The defendant had assured the court at the time of the plea acceptance that he intended to use the house proceeds to pay off the restitution. Although the information from the Florida authorities indicated that the defendant was homeless and had not worked for two months, his monthly reports to the Department of Corrections were also introduced showing that he had earned a total of $13,000 between August and November of 2006.

The district court determined that the defendant had violated the terms of probation by failing to make his monthly restitution payments as ordered by the court, by failing to maintain suitable employment, and by failing to apply the proceeds from the sale of his home to the restitution owed. The defendant claimed that this was error since he was financially unable to make the required monthly payments and he put forth a good faith effort to make restitution payments and to repay the money.

The district court's determinations on whether the defendant violated the terms of probation are findings of fact. Probation revocation is not a stage of the criminal proceedings and the State need only prove a probation violation by a preponderance of the evidence. Although the State generally has the burden of proving the defendant violated the terms of probation, the defendant has the burden to raise and prove an inability to pay restitution at revocation proceedings triggered by the defendant's failure to pay ordered restitution.

There was no dispute that the defendant failed to make the required monthly payments. The defendant claimed that there was no evidence that he had willfully failed to pay restitution because the State had not shown that he had frivolously spent his income or squandered his earnings. Rejecting this argument, the court noted that the defendant's argument was premised upon a misunderstanding of which party bore the burden of proof. The State was not required to show that the defendant had squandered the $55,000 in house sale proceeds and $13,000 in salary but, rather, Jacobsen had the burden to explain where the funds went and why they were unavailable to satisfy his restitution obligation. The defendant provided no such information to the court.

The record demonstrated that it considered whether the defendant had the means to pay the ordered restitution. The defendant failed to rebut the State's evidence regarding receiving sums of money sufficient to pay restitution payments when due. When a defendant can pay, but willfully fails to pay, there is no requirement that alternative forms of punishment be considered and the court may revoke probation and sentence the defendant to imprisonment. In addition, a distinction exists between restitution being ordered as a part of a plea agreement and restitution ordered upon the court's own initiative. Allowing the defendant to avoid restitution by subsequently pleading indigency after entering into a valid plea agreement would be a windfall to the defendant. The defendant had control over the plea agreement and its contents.

DUI - FAIR ADMINISTRATION OF INTOXILYZER TEST

In *Buchholtz v. Director, North Dakota Department of Transportation*, 2008 ND 53, 746 N.W.2d 181, the DOT appealed a district court judgment reversing the DOT's decision revoking Buchholtz's driving privileges for 180 days. This district court decision was reversed on appeal by reinstating

the hearing officer's suspension of Buchholtz's license.

After Buchholtz's arrest for DUI, the arresting officer patted Buchholtz down, checked his pockets, removed all items from his pockets, placed the items on the front seat of the patrol car, and then put Buchholtz in the back seat of the patrol car. The trooper left Buchholtz alone in the car for approximately five minutes while the trooper spoke with Buchholtz's passenger and after moving Buchholtz's car off the roadway.

Buchholtz was taken to jail. He observed Buchholtz in the rear view mirror and, after arriving at the jail, Buchholtz was asked if he had anything in his mouth. Buchholtz replied that he did not, and this was verified by the trooper.

The district court concluded that the intoxilyzer test was not fairly administered because the trooper did not observe Buchholtz for five of the 20-minute waiting period before administering the intoxilyzer test.

In reversing the district court's decision, the court noted that fair administration of an intoxilyzer test may be established by proof that the method approved by the state toxicologist for conducting the test has been scrupulously followed. However, "scrupulous" compliance does not mean "hypertechnical" compliance. To comply with the approved method, the trooper had to "ascertain" that Buchholtz had nothing to eat, drink, or smoke within 20 minutes leading up to the collection of the breath samples.

Observing the subject is not the only manner of ascertaining that the subject had nothing to eat, drink, or smoke within 20 minutes prior to the collection of the breath sample. Observation is not the exclusive method of ascertaining whether the 20-minute requirement has been met. A fact-finder can draw reasonable inferences from the evidence, and it is not unreasonable for a fact-finder to infer that a person who has been handcuffed behind his back and remained in police custody would have had nothing to eat, drink, or smoke during that time. Although Buchholtz's hands were not handcuffed behind his body in this case, he was patted down, his pockets were emptied, all items retrieved from his pockets were placed on the front seat of the patrol car, and he was placed in the back seat during the five-minute period in which the trooper was not actually watching him. These facts would permit a reasonable fact-finder to infer that Buchholtz did not put anything in his mouth during this five-minute period.

The state toxicologist's approved method does not require test operators to ask subjects if they have anything in their mouths or to check their mouths prior to administering the test. Although the court has encouraged test operators to check the mouths of those whom they test, the court has declined to impose such a requirement. The fact that the trooper did not check Buchholtz's mouth at the time of arrest does not suggest he failed to comply with the approved method. Because scrupulous, but not hypertechnical, compliance is required and because a fact-finder may draw reasonable inferences based on the evidence presented, the district court committed error in reversing the decision of the department. The department established the intoxilyzer test was fairly administered in accordance with the approved method.